

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES**

* * * * *

**AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 5, 6, 65, 77, 81, and 82, and abrogation of the Copyright Rules with a recommendation that they be approved and transmitted to the Judicial Conference. With the exception of the amendments to Rule 82, which involve only a technical conforming change, the amendments were published for comment by the bench and bar in August 1999. The scheduled public hearing was canceled because the single request to testify was withdrawn.

Electronic and Other Service

The proposed amendment of Rule 5(b) (Service and Filing of Pleadings and Other Papers) would permit electronic service on parties who give written consent. Under the amendment, electronic service would be complete on transmission. But service by electronic means is not effective if the party making service learns that the attempted service did not reach the person served. (Civil Rule 5 is cross-referenced in Bankruptcy Rule 7005 and Criminal Rule 49(b), which extend the application of Rule 5 to adversary proceedings in bankruptcy cases and to criminal cases.) The language and formatting of Rule 5(b) also were restyled.

Rule 6(e) (Time) would be amended to provide a party with an additional three days to respond to a paper served by electronic means. Although electronic service often is instantaneous,

delays frequently occur. The added three-day response time is consistent with the three-day “mail rule” and is intended to eliminate any perceived disadvantage in using electronic means.

The proposed amendments to Rule 77(d) (District Courts and Clerks) would permit courts to serve notices by electronic means on parties who have so consented.

Copyright Rules

The Copyright Rules of Practice were prescribed by the Supreme Court and are set out in 17 U.S.C.A. following § 501. They deal only with prejudgment seizure of copies alleged to infringe a copyright. The rules were written for the 1909 Copyright Act and have not been changed to reflect inconsistent provisions in the 1976 Copyright Act. They do not conform to modern concepts of due process. In 1964 the advisory committee challenged the seizure procedure as one that:

is rigid and virtually eliminates discretion in the court; it does not require the plaintiff to make any showing of irreparable injury as a condition of securing the interlocutory relief; nor does it require the plaintiff to give notice to the defendant of an application for impounding even when an opportunity could feasibly be provided.

These problems prompted the advisory committee in 1964 to recommend that the Copyright Rules be abrogated and that Civil Rule 65 be amended to provide an impoundment procedure for articles involved in an alleged copyright infringement. The recommendation was withdrawn because Congress was considering a thorough revision of the copyright laws that was eventually enacted in 1976.

The advisory committee actively solicited comment in 1997 from organizations and experienced counsel on the need to update the Copyright Rules. The advisory committee notified staff of the House Judiciary Subcommittee on Courts and Intellectual Property of its intent to recommend that the Copyright Rules be abrogated. Representative Howard Coble (R-NC), chairman of the subcommittee, expressed concern that any proposed amendment might interfere with pending copyright legislation and

ongoing United States multilateral treaty obligations. The United States has been actively encouraging all countries to provide effective intellectual property protections. At Chairman Coble's request, the advisory committee deferred recommending publication of the proposals for one year.

During the one-year delay, Congress acted on pending measures. The advisory committee has now concluded that the Copyright Rules should be abrogated and Civil Rule 65 be amended to expressly govern impoundment proceedings. Under the proposed amendments, impoundment may still be ordered on an ex parte basis if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. But the proposed changes would eliminate the concern that the rules may be invalid and will help ensure that the United States is in compliance with its international obligations.

Amendments to Rule 81 (Applicability in General) are proposed to conform to the abrogation of the Copyright Rules, to eliminate an outdated reference to mental health proceedings, and to clarify a reference to the Bankruptcy Rules.

Technical Conforming Amendment

Rule 82 (Jurisdiction and Venue Unaffected) would be amended to correct a citation to a repealed section of title 28 of the United States Code. In accordance with Judicial Conference procedures governing the rulemaking process, the Committee determined that the change need not be published for comment because it was solely a technical conforming amendment.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Civil Procedure and the abrogation of the Copyright Rules are in Appendix B together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 5, 6, 65, 77, 81, and 82, and a proposed abrogation of the Copyright Rules and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *